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No. 87-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SUSAN MARY NORRIS,

Petitioner,

v.

WILLIAM W. WIRTZ, Individually, as Trustee, and as Executor of the Estate of ARTHUR M. WIRTZ, ST. LOUIS ARENA CORPORATION, ARENA BOWL, INC., and WIRTZ CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), requires a federal court to "borrow" a purported state trust law rule indefinitely tolling the statute of limitations, where the state would not apply the purported tolling rule to the "borrowed" limitations period and where the district court held that the purported rule did not correctly describe state law.

2. Whether the Seventh Circuit's use of the traditional standard of "reasonable diligence" in analyzing petitioner's claim that the statute of limitations should be tolled, a standard to which petitioner failed to object at trial or on appeal, creates a conflict among the Circuits meriting review by this Court.

3. Whether petitioner can raise in this Court a claim that the Seventh Circuit did not consider that the statute of limitations should be tolled because petitioner was a minor, when petitioner did not so argue at trial or on appeal, and when, even accepting petitioner's claim, she reached the age of majority over ten years before she filed suit.

4. Whether it violates the Seventh Amendment for a court of appeals to direct the granting of a motion for judgment notwithstanding the verdict.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

In compliance with Rule 28.1, the parent companies, subsidiaries (other than wholly owned subsidiaries) and affiliates of the corporate respondents are as follows: Forman Realty Corporation, American Mart Corporation, Bismarck Hotel Corporation, Chicago Stadium Corporation, N&W Corporation, Consolidated Enterprises, Inc., Chicago Blackhawks Hockey Team, Inc., Griggs Cooper Co., Longhorn Liquors, Inc., Wolverine TV Productions, Inc., Forman TV Productions, Inc., and Sportsvision, Inc.

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STATEMENT OF THE CASE

Petitioner is the daughter of James D. Norris, a business associate of Arthur Wirtz in several closely-held corporations. Upon Mr. Norris' death on February 12, 1966, his stock in three of those corporations, St. Louis Arena Corporation, Arena Bowl, Inc., and Judge & Dolph, Ltd., passed to his estate. The Wirtz Corporation, which was controlled by Arthur Wirtz, held the majority interest in

St. Louis Arena Corporation and Judge & Dolph, Ltd.; Wirtz Corporation and Mr. Norris each held 50% of the stock of Arena Bowl, Inc. (Tr. 145-46, 333; PX 101)[1]

Mr. Norris was survived by his wife, Mary, and by petitioner. In his last will, he appointed his wife and William Wirtz, Arthur Wirtz's son, as co-executors of his estate, and he made William Wirtz trustee of two testamentary trusts: a marital deduction trust in favor of Mary, and a residuary trust in favor of petitioner.[2] (PX 1) William Wirtz had been active in all the closely-held corporations operated by Arthur Wirtz and Mr. Norris, and he held beneficial interests in Wirtz Corporation. (Tr. 121)

Mr. Norris' will contained several provisions specifically mentioning the Wirtzes and the closely-held Wirtz-Norris corporations. The will expressly recognized that the estate would hold stock in "closely held corporations of which . . . Arthur M. Wirtz and/or members of his family and myself and/or members of my family, have joint ownership or control." The will granted the closely-held corporations and the shareholders of those corporations a right of first refusal upon any sale of the estate's stock in the corporations. Mr. Norris' will also contemplated an orderly liquidation of the stock in the "best interests of Arthur M. Wirtz, and his family members, as well as to my estate and the trusts created hereunder." Finally, the

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[1] In this Brief, "Tr. ____" refers to the trial transcript; "PX ____" refers to petitioner's trial exhibits; "Pet. ____" refers to the Petition for Writ of Certiorari; "P. App. ____" refers to Petitioner's Appendix; and "R. App. ____" refers to Respondents' Appendix.

[2] The trusts were to be funded upon payment of the estate's federal tax obligations. (PX 1, p. 11) This did not occur until 1977, due to lengthy estate tax proceedings. Thus, all of the sales of stock at issue in this case were made by the co-executors before the trusts were funded.

will provided that William Wirtz's decision to sell the estate's interests in the closely-held Wirtz-Norris corporations "shall be final, binding and conclusive, and [William Wirtz] shall not be accountable to any present or future income beneficiaries for his action in the performance and the exercise of the powers and authorizations herein conferred upon [him]." (PX 1, pp. 10-14)

In September 1967, William Wirtz and Mary Norris, as co-executors, presented a petition to the probate court seeking approval of the redemption of the estate's shares of St. Louis Arena Corporation. (PX 301) On the same date, the co-executors petitioned for approval of the redemption of the estate's shares of Arena Bowl, Inc. (PX 401) Both petitions were signed and approved by Mary Norris, William Wirtz, and petitioner.[3] At the time, petitioner was 18 years old, an adult, and emancipated. (Tr. 1462, 1478)

Attached to the petitions were certified financial statements. (PX 302, 403A) The financial statements reflected that the proposed redemption prices were equal or nearly equal to the book value of the corporations' assets. In addition, the financial statement accompanying the St. Louis Arena Corporation petition stated that the corporation's sole shareholders were Wirtz Corporation and James D. Norris. (PX 302) The probate court approved the sales (PX 303, 402); the estate received nearly $2,700,000. Of this,

[3] At trial, petitioner identified her signature on both petitions. (Tr. 1431-32) She also testified, in substance, that she had seen the financial statements attached to the petitions. (Tr. 1475, 1513)

$1,600,000 was used promptly to pay the estate's initial federal and state death taxes.[4]

Approximately one year later, on September 27, 1968, the co-executors presented to the probate court a petition seeking approval for the sale of the estate's 8,625 shares of Judge & Dolph, Ltd. to Wirtz Corporation for $20 per share. (PX 101) The probate court order approving the sale recited that "all parties of interest have verbally approved the subject offer." (PX 102)

Petitioner was 19 years old at the time of the Judge & Dolph transaction. She testified that she had no memory with regard to the transaction. (Tr. 1436, 1486-87) William Wirtz testified that he had asked Mary Norris to request her daughter's approval and that Mary had later told him that petitioner approved. (Tr. 391-92) The attorney who drafted the petition testified that Mary Norris advised him sometime between the date of preparation of the petition and the date of the probate court hearing that petitioner had voiced her approval. (Tr. 572, 626) The estate received $172,500 for its Judge & Dolph stock.

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[4] Petitioner claims that the petitions "falsely stated . . . that the securities had to be sold to raise money for the payment of taxes when in fact there were liquid assets from which the taxes could have been paid." (Pet. 4) However, the case was not submitted to the jury on that theory. At petitioner's behest, the jury was instructed based solely upon the theory that defendants had misrepresented the value of the estate's stock. (Tr. 2100-01) Nor did petitioner ever contend, as the petition suggests (Pet. 5), that her claim was based in any way on the failure to appoint a guardian *ad litem* to represent her in the three transactions. Indeed, the undisputed evidence demonstrated that plaintiff was an emancipated adult at the time of the transactions. *See infra* at 18.

Over seven years later, during her mother's final illness in late 1975, petitioner hired a New Jersey attorney, Emil Cuccio. (Tr. 1348-49, 1520-21) Cuccio's January 20, 1976 letter to William Wirtz stated that petitioner had authorized him "to seek an inventory of the estate as well as intermediate accountings prepared between the date of death of the Testator and the date of final settlement of the estate," and that petitioner "desires an accounting of the principal and income derived from [her] trust from the date of the death of her father up to and including the present time." He offered to discuss "the position of [his] client" with William Wirtz "in the presence of the estate's attorneys." (PX 501) William Wirtz advised Cuccio in response that petitioner, and not the estate, would be required to pay Cuccio's fees. (Tr. 1557) Cuccio acknowledged this position but "reserve[d] the right to make such applications to the courts of Illinois . . . for any and all counsel fees and costs which may result from any issues subject to litigation in said forum." (PX 503)

Cuccio's January 20, 1976 letter also noted that he had reviewed James Norris' will. The will, as previously discussed, referred to the Wirtz-Norris companies and expressly contemplated both the sale of the estate's stock in those entities and purchase of the stock by the Wirtzes through their right of first refusal. (PX 1) Cuccio testified that he was aware that the will contained a discussion regarding the closely-held corporations. (Tr. 1353-54) He also testified that he realized that William Wirtz was operating under an apparent conflict of interest as co-executor of the Norris estate, as a result of his interests in the Wirtz-Norris corporations. (Tr. 1407)

Cuccio further testified that he was never refused any information by William Wirtz or Kenneth Scranton, the estate's attorney. (Tr. 1395, 1401) In addition, available to him as part of the public record of the probate court

proceedings were the petitions seeking approval for the three sales of stock, the financial statements attached to the petitions, and the probate court orders approving the sales.[5] Also available as part of the public record was the First Interim Account filed by Mary Norris and William Wirtz as co-executors, which disclosed the three sales and the sale prices.[6] Cuccio's awareness of the Accounts was demonstrated by the reference in his January 20, 1976 letter to "intermediate accountings."

In the autumn of 1977, Cuccio represented petitioner in connection with a proposed redemption of the estate's stock in another closely-held Wirtz-Norris concern. As was true of the St. Louis Arena, Arena Bowl, and Judge & Dolph purchases, the proposed 1977 purchase would have left Wirtz Corporation as the principal remaining shareholder. Indeed, the district court noted the striking similarity of the transactions. (Tr. 1002-06) Cuccio was, as demonstrated by his testimony, well aware of the problems inherent in valuation of the closely-held stock; he explained, in a meeting in November 1977, his belief that "the only way to determine the fair market value is by way of appraisal." (Tr. 1387-88)

Petitioner did not file her suit, however, until December 24, 1980, over thirteen years after the St. Louis Arena Corporation and Arena Bowl, Inc. transactions, five years

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[5] As the district court noted, "[i]t's hard to take over the representation of a beneficiary without reading the court file, and these petitions are in the court file." (Tr. 1761)

[6] Petitioner states that the three later Accounts filed by Mrs. Norris and Mr. Wirtz did not disclose any information concerning the three transactions. Under Illinois law in effect at the time, however, an executor was required to disclose in an Account only those receipts and disbursements that occurred subsequent to the previous Account. Former Ill. Rev. Stat. ch. 3, §289. Because the three transactions in question were disclosed in the First Account, the co-executors had no duty to disclose them in the later Accounts.

after hiring attorney Cuccio, and more than three years after the similar 1977 transaction. She maintained that respondents had misrepresented the value of the stock sold by the estate in the three transactions approved by the probate court in 1967 and 1968. The complaint in effect asserted that the unfairness of the prices was disclosed on the face of the probate court petitions, the balance sheets supporting the petitions, and the will, i.e., that the sales were self-dealing transactions made at the book value of the shares, a value which bears no relationship to "fair market price."

The parties agreed at all stages of the proceedings that the applicable statute of limitations was the three-year period supplied by the Illinois Securities Act. (Pet. 12) In petitioner's complaint, she attempted to excuse her delay by alleging that she had exercised due diligence in attempting to discover the facts which gave rise to her claims.

The case was tried before a jury in December 1985. By that time, Arthur Wirtz had died, and the memory of several of the other key witnesses had faded. The jury returned a verdict in favor of petitioner. The district court denied respondents' motion for judgment notwithstanding the verdict on the statute of limitations issue, though the court noted that as a finder of fact, "it might well have reached a different conclusion: there was much evidence that plaintiff did not act with due diligence in bringing suit." (P. App. B2)

The Seventh Circuit reversed. The court concluded that the applicable rule of law was, "as the district court had concluded, that the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit is based." (P. App. A-9) It held that, "even resolving all

doubt in [petitioner's] favor" (*id.* A-12), petitioner and her attorney Cuccio "knew (or readily could have learned) enough to call for inquiry" more than three years before petitioner filed suit. (*Id.* A-12, 13)

The court concluded initially that "[t]he documents handed to [petitioner] in 1967, coupled with the identity of the trustee and the corporations in question, were enough to put a reasonable person on notice of the need for inquiry," an inquiry that "promptly would have turned up everything necessary to file a complaint." (P. App. A-11) Alternatively, the court held that "[e]ven if [petitioner] were so under the sway of William [Wirtz] in 1967 that a reasonable person in her position would not have commenced an inquiry," petitioner could not rely on such an excuse as of 1975, when she hired Cuccio. (*Id.*) As of no later than November 1977, still more than three years before petitioner filed her lawsuit, Cuccio's independent knowledge, coupled with what petitioner had known since 1967, "was enough to spark an inquiry, indeed to file this suit." (*Id.* A-13) As the court concluded, "[t]hat [petitioner] may have forgotten things by 1977 is unimportant; a plaintiff's obliviousness may not be visited on the defendants." (*Id.* (citations omitted))[7] The court therefore held that respondents' motion for judgment notwithstanding the verdict should have been granted.

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[7] Petitioner contends that the Seventh Circuit "totally ignored" petitioner's claim of fraudulent concealment by defendants. (Pet. 9) The claim was so spurious that not even the dissenting judge mentioned it. It is readily apparent that the court found the issue so insubstantial that it did not require comment.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

PETITIONER'S EQUITABLE TOLLING CLAIM IS BASED SOLELY UPON A DUBIOUS CONSTRUCTION OF ILLINOIS TRUST LAW THAT THE DISTRICT COURT AND COURT OF APPEALS PROPERLY REJECTED

The Seventh Circuit did not, as petitioner contends, "effectively hold that it will not apply state tolling principles in Rule 10b-5 litigation if to do so would allow the plaintiff to sue more than three years after the fraudulent transaction." (Pet. 11) Rather, the Seventh Circuit followed the rules set forth in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980) and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), and applied the appropriate tolling rule. Petitioner focuses on *dictum* in the Seventh Circuit's opinion in the hope of creating an issue where none exists.

The parties have agreed at all stages of the proceedings (*see* Pet. 12) that the applicable statute of limitations was the three-year period supplied by the Illinois Securities Act (referred to by petitioner as the state's "Blue Sky Law").[8] *See* Ill. Rev. Stat. ch. 121½, §137.13D. Petitioner did not sue until 13 years after the initial sales of stock; she claimed, however, that the statute should be tolled. The threshold issue presented was, under *Tomanio*, one

[8] Petitioner suggests that the Court "should settle" whether the appropriate state statute of limitations to borrow in an action under Rule 10b-5 is that contained in the pertinent state's Blue Sky Law or instead in some other statute. (Pet. 20) That issue is not presented by this case, however, as the parties have *agreed* at all stages that the Illinois Securities Act supplies the applicable statute. Further, petitioner does not suggest any inter-circuit conflict on this point.

of Illinois law: what tolling rule applies to the statute of limitations contained in the Illinois Securities Act?

That issue of Illinois law remains the linchpin of petitioner's argument. She claims the benefit of a purported rule of Illinois trust law that she argues tolls the statute of limitations as to a trust beneficiary unless the trustee confesses his fraud or expressly repudiates the trust. (Pet. 12-14) Petitioner argues that this purported rule must, under *Tomanio*, be applied. If she is wrong in her view of Illinois law, however, petitioner's *Tomanio* argument must fail, for she does not (and has not at any time) urged the applicability of any alternative tolling rule other than that which the district court and Seventh Circuit applied.

Even were such an issue of state law worthy of this Court's consideration, petitioner's reading of Illinois law was squarely rejected by the district court. In a pretrial ruling, the district court "looked to state law to find tolling principles" (*see* P. App. A-3) and held that petitioner's "status as the beneficiary of a trust tolled the running of the statute until she learned (or in the exercise of due diligence could have learned) of the trustee's treachery." (*Id.*) As this Court has held, a federal district court's construction of state law is entitled to great weight. *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 203-04 (1956).

In accordance with its pretrial ruling, the district court instructed the jury that petitioner had the burden of proving that she "exercised reasonable care and diligence in seeking to learn the facts which gave rise to her claim but did not discover them prior to December 24, 1977." (Tr. 2103) *Petitioner interposed no objection to the court's instruction.*[9]

[9] The instruction that the district court gave closely paralleled an instruction tendered by petitioner. (R. App. 1, 2) Petitioner did

(Footnote continued on following page)

Despite her failure to object to the district court's tolling instruction, petitioner reasserted on appeal her claimed rule of Illinois trust law. As the court of appeals correctly noted, however, petitioner could not point to any authority in Illinois or elsewhere applying such a rule to a securities case.[10] (P. App. A-8)

Petitioner argues that the Seventh Circuit improperly drew its tolling rule from federal law. (Pet. 15) However, the Seventh Circuit applied the very same rule that the district court had held emerged from state law. Indeed, the Seventh Circuit expressly held that the district court had applied the correct rule: "*as the district court concluded*, . . . the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit was based." (P. App. A-9 (emphasis added)) Thus, irrespective of the derivation of the Seventh Circuit's rule, it is clear that the court upheld the district court's jury instruction, which itself was unquestionably based upon Illinois law, and applied the same tolling rule.

Petitioner claims, citing *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Insurance Co.*, 698 F.2d 320, 328 (7th Cir. 1983), that the Illinois Securities

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[9] *continued*

not object to the tolling instruction or to the court's failure to give another instruction, tendered by petitioner, setting forth her purported rule of Illinois trust law. *See* Fed. R. Civ. P. 51.

[10] Petitioner asserts that the Seventh Circuit, in *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 356 (7th Cir. 1979), indicated that in a federal securities fraud case concerning a trust beneficiary, the purported trust-law tolling rule now advanced by petitioner must be applied. (Pet. 14) Petitioner's reliance upon *Nemkov* is misplaced. The court plainly did not decide whether that purported rule applies to securities fraud claims; rather, it simply noted that the plaintiff had so argued and then held, for other reasons, that the "rule" did not apply. This is far from acceptance of the rule or even an "indication" that it should apply in Rule 10b-5 cases.

Act "clearly embrace[s] tolling." (Pet. 17 n. 7) *Peoria Union* does not assist petitioner's cause, however, for the Illinois case that the Seventh Circuit cited for that proposition applied the same tolling rule used in the present case. In *Tarpoff v. Karandjeff*, 17 Ill. 2d 462, 162 N.E.2d 1 (1959), the Illinois Supreme Court stated that the statute of limitations "will not begin to run . . . until discovery of the fraud *or such time it should have been discovered if reasonable diligence had been exercised.*"[11] 162 N.E.2d at 5 (emphasis added).

In short, petitioner's argument that the Seventh Circuit did not apply Illinois law begs the question whether petitioner's claimed rule *correctly states Illinois law.* Stripped to its essentials, petitioner's quarrel with the decisions below is that they misconstrued the Illinois law applicable under the Illinois Securities Act. Even were petitioner correct, this Court does not sit to decide such state law issues.

Petitioner makes much of the Seventh Circuit's observation that rather than borrowing state statutes of limitation and tolling rules, "[c]ourts should have drawn the periods of limitations for the implied rights from the period of limitations for express rights," that is, the statutes of "repose" contained in those provisions of the Securities Exchange Act of 1934 that provide for express rights of action. (P. App. A-6) It is clear, however, that this is mere *dictum*; as the Seventh Circuit went on to note, "it is too late for an inferior federal court to turn back the clock." (*Id.* A-8)

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[11] Petitioner concedes that *Tarpoff* considered the issue "in a fiduciary context." (Pet. 17 n. 7)

The Seventh Circuit relied on its reference to "statutes of repose" only in declining to accept petitioner's argument that a trust beneficiary is, in a Rule 10b-5 case, entitled to a specialized tolling rule of indefinite length. The court stated that a rule that would permit a plaintiff to wait indefinitely before bringing suit, imposing no duty to exercise due diligence even if the plaintiff were on notice of facts indicating a possible claim, "is not a tolerable rule for securities cases," given Congress' limitation upon the application of tolling rules in express rights of action under the Securities Exchange Act. (P. App. A-8) As the Seventh Circuit correctly noted, petitioner's proposal "would excuse investors from all duty of inquiry, even after they have been put on actual notice that something is amiss." (P. App. A-8) In so stating, the Seventh Circuit did nothing more than follow this Court's directive that a federal court examine whether a state tolling rule that is to be "borrowed" comports with federal policy. *Tomanio*, 446 U.S. at 485; *Johnson*, 421 U.S. at 465. This Court need not reach this issue, however, as petitioner's proffered tolling rule has *no support* in Illinois law.

Petitioner's first argument is thus phrased disingenuously. The issue is not *whether* state tolling provisions should be applied in Rule 10b-5 cases; state tolling provisions in fact were applied by the district court, and the Seventh Circuit upheld the district court's rule. Rather, the issue is whether Illinois law would excuse a securities litigant from any duty to inquire merely because she is a trust beneficiary. Besides the fact that petitioner relies upon an unsupported, dubious, and rejected theory of Illinois law, she has demonstrated no conflict in the circuits on this question and no reason why such a singular and essentially local issue should occupy the attention of this Court.

II.

THERE IS NO CONFLICT IN THE CIRCUITS CONCERNING THE REASONABLE DILIGENCE STANDARD

The Seventh Circuit framed the applicable tolling rule as follows: "the time to file suit begins to run when the investor either knows or in the exercise of reasonable diligence could have discovered the facts on which the suit is based." (P. App. A-9) The district court applied the same rule. (*Id.*) Now, for the first time, petitioner argues that the rule's traditional "reasonable diligence" prong should be excised because it conflicts with holdings from other circuits and "obliterates the significance of [petitioner's] . . . individual characteristics." (Pet. 21) This contention does not warrant review because it was not raised below and is entirely spurious.

Contrary to her present argument, petitioner agreed on appeal that the central inquiry was whether she "fail[ed] to act with reasonable care and diligence." (*See* Petitioner's Appeal Brief at 34) Furthermore, petitioner did not object to the trial court's use of the reasonable diligence standard in the instruction given the jury. That instruction stated that petitioner was required to "file suit within three years from the date when she knew or *should have known* of the facts which give rise to her claims" and that she bore the burden of proving that she "*exercised reasonable care and diligence* in seeking to learn the facts which gave rise to her claim." (R. App. 2 (emphasis added))

Having consented repeatedly to this formulation of the issue, petitioner cannot complain of it for the first time in this Court. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n. 25 (1984). *See also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 244-45 (1985); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Miree v. DeKalb County*,

433 U.S. 25, 33-34 (1977); *Tennessee v. Dunlap*, 426 U.S. 312, 316 n. 3 (1976).

Besides raising an issue she has waived, petitioner attempts to fabricate a circuit conflict where there is none. Contrary to petitioner's assertions, *no* court has disavowed the tolling doctrine's reasonable diligence prong, which petitioner calls "objective," nor has any court endorsed what she claims is a different, "subjective" inquiry reserved solely for the jury. Indeed, two purportedly distinct approaches do not even exist—the traditional reasonable diligence standard is applied uniformly.[12]

To support her contention, petitioner blatantly misconstrues the caselaw. For example, she states that in *Sperry v. Barggren*, 523 F.2d 708 (7th Cir. 1975), the Seventh Circuit "lined up on the 'subjective' side of the issue." (Pet. 21) This is simply not true. The court in *Sperry* expressly applied the reasonable diligence standard, stating that " 'the statute of limitations is tolled until the plaintiff has obtained knowledge of the fraud *or in the exercise of due care* should have obtained knowledge of the fraud.' " 523 F.2d at 710 (emphasis added) (quoting *Hochfelder v. Midwest Stock Exchange*, 503 F.2d 364, 375 (7th Cir.), *cert. denied*, 419 U.S. 875 (1974), and citing *Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946) and *Baily v. Glover*, 88 U.S. (21 Wall.) 342, 347-48 (1875)). *Sperry* notes that the question of reasonable diligence ordinarily is for the jury. As in any other such inquiry,

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[12] Illinois also applies the traditional reasonable diligence standard. In *Tarpoff v. Karandjeff*, 17 Ill.2d 462, 162 N.E.2d 1, 5 (1959), a case petitioner uses to illustrate Illinois tolling principles (Pet. 17 n. 7), the Illinois Supreme Court held that in a fraud action, the statute of limitations is tolled "until discovery of the fraud or such time it should have been discovered if reasonable diligence had been exercised."

however, where the evidence is wholly insufficient the matter becomes one for the court.

Like *Sperry*, each and every one of petitioner's cases—as well as this Court—uses the traditional "reasonable diligence" standard. *See United States v. Kubrick*, 444 U.S. 111, 120-24 (1979) (applying reasonable diligence standard in the context of the Federal Tort Claims Act statute of limitations); *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 171-72 (10th Cir. 1974); *Lang v. Paine, Webber, Jackson & Curtis, Inc.*, 582 F. Supp. 1421, 1427 (S.D.N.Y. 1984); *Morgan v. Dain Bosworth*, 545 F. Supp. 953, 955 (D. Colo. 1982); *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 472 F. Supp. 402, 406 (D. Colo. 1979), *aff'd*, 651 F.2d 687 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981); *Kaufman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 464 F. Supp. 528, 540 (D. Md. 1978).

Indeed, in two of petitioner's cases, courts granted summary judgment to the defendants because, *as a matter of law*, the plaintiffs could not establish reasonable diligence. *See Lang*, 582 F. Supp. at 1427-28; *Peterson, Lowry*, 472 F. Supp. at 408-10. In all of the other cases cited by petitioner, the courts merely found in the context of summary judgment proceedings that a material issue of fact existed concerning reasonable diligence. *See Sperry*, 523 F.2d at 710; *Dzenits*, 494 F.2d at 172-73; *Kaufman*, 464 F. Supp. at 540; *Morgan*, 545 F. Supp. at 955-56. There is nothing in any of these cases that remotely suggests a circuit conflict over the viability of the tolling doctrine's reasonable diligence inquiry.

Petitioner further complains that the reasonable diligence standard applied by the Seventh Circuit obliterates the distinctions among plaintiffs. She is mistaken. The Seventh Circuit was not, as she claims, "blind" to her particular situation. Instead, as in any "objective" inquiry

into reasonableness, the relevant question is what a reasonable person would have done in the plaintiff's position, given the plaintiff's circumstances and knowledge. The Seventh Circuit has put it this way—"the plaintiff has a duty of diligence: it is not enough that he did not discover he had a cause of action, if a reasonable man *in his shoes* would have." *Taylor v. Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983) (emphasis added).

Consistent with these principles, the Seventh Circuit in this case meticulously examined every relevant fact in evidence bearing on the issue, including the petitioner's age and sophistication, the information she and her lawyer possessed, and the existence of a fiduciary relationship. On these facts, the court determined that the evidence was insufficient to sustain the jury's finding that petitioner had acted with reasonable diligence. The court clearly evidenced its careful consideration of petitioner's situation: "[e]ven if Susan were so under the sway of William [Wirtz] in 1967-68 that *a reasonable person in her position* would not have commenced an inquiry, *by 1975 she was no longer so pliable.*" (P. App. A-11 (emphasis added)) There simply is no merit to petitioner's claim that the court was blind to her situation.

Petitioner attempts to conjure up confusion and conflict where there is none. The district court and the Seventh Circuit unquestionably applied the appropriate standard to the tolling question. Petitioner's misguided attack on this standard does not merit this Court's review.

III.

PETITIONER WAIVED ANY ARGUMENT THAT HER CHARACTERIZATION AS AN "ADULT" CONTRAVENED *STANTON v. STANTON,* 421 U.S. 7 (1975); THE SEVENTH CIRCUIT DID NOT RELY ON HER STATUS AS AN ADULT IN RENDERING ITS DECISION; AND SHE PROPERLY WOULD HAVE BEEN CONSIDERED AN ADULT UNDER ILLINOIS LAW IN ANY EVENT

Petitioner's claim that if she were "a male, the jury verdict in her favor would have been upheld by the Seventh Circuit" (Pet. 25) is preposterous, as any fair reading of the Seventh Circuit's opinion shows. Petitioner's attempt to seize upon one of numerous factors considered by the court in arriving at its decision is nothing more than an effort to conjure up an issue of constitutional dimension out of thin air. Petitioner waived this argument both in the district court and the court of appeals, having raised the point for the first time in her petition for rehearing. She cannot now claim to be aggrieved by her own failure to raise the question.

At trial, respondents offered, without objection or response, evidence that at the time of the transactions, petitioner was eighteen years old and emancipated from her mother. (Tr. 1462, 1478) In closing argument, respondents argued to the jury that petitioner was "18 years old. She's an adult in the eyes of the law." (Tr. 2023) Petitioner did not object to this statement or challenge it in her rebuttal argument.

Petitioner also sought no instruction on the question. The proposed jury instruction tendered by petitioner on the statute of limitations issue (*see* R. App. 1)[13] employed

[13] Petitioner's tendered instruction was not part of the record on appeal. The district court did not include the tendered instructions in the record as a matter of course, and, as petitioner did

(Footnote continued on following page)

the same standards that are applied to adults and made no reference to petitioner's now belatedly-claimed minority. Nor did petitioner object to the district court's jury instruction, which similarly did not make an adult-minor distinction. (*See* R. App. 2.)

Finally, petitioner made no response whatsoever to the statement in respondents' opening brief on appeal that at the time of the initial transactions, petitioner "was . . . 18 years old, an adult, and emancipated" (Resp. Appeal Brief at 6), other than to agree that petitioner was 18 years old at the time of the 1967 transactions. (Pet. Appeal Brief at 7) While petitioner argued that the fact that she was "a teenage girl" was a factor that the jury had taken into account (*id.* at 26), she did not argue that she was a minor in the eyes of the law, cite *Stanton*, or suggest that any special legal rules should apply to her due to her age.

This is a clear case of invited error. Petitioner's belated raising of the issue for the first time in her petition for rehearing, which the court of appeals denied without calling for a response, reveals that the issue is nothing more than an afterthought. Petitioner's reliance on *California Bankers Association v. Schultz*, 416 U.S. 21, 71 (1974) (*see* Pet. 26) is misplaced, for in *Schultz*, though the issue in question was not decided by the lower court, it had been argued before that court. *Schultz* does not hold that issues never raised at trial or on appeal may be argued in this Court.

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[13] *continued*
not object to the instruction actually given by the court, she did not request that her own instruction be included in the record. Because petitioner did not argue in her brief on appeal that she was *legally entitled* to special treatment because she allegedly was a minor, there was no occasion to make the tendered instruction part of the record. Should this Court grant *certiorari*, respondents will take the necessary steps to supplement the record.

Petitioner's argument is, in any event, meritless. Even were the three-year statute of limitations considered tolled until petitioner reached the age of 21, she did not file suit until ten years later. Petitioner does not argue that the knowledge that she had as a "minor" is to be ignored in determining whether the statute of limitations started to run after she reached the age of majority. Illinois law holds otherwise. *See Ikenn v. Northwestern Memorial Hospital*, 73 Ill. App. 3d 694, 392 N.E.2d 440, 444 (1979).

Further, the Seventh Circuit's holding does not hinge upon its initial conclusion that the statute of limitations began to run in 1967-68, at the time of the transactions.[14] As the court stated:

> We need not rest entirely on this. Even if Susan were so under the sway of William in 1967-68 that a reasonable person in her position would not have commenced an inquiry, by 1975 [at age 26] she was no longer so pliable. Susan was then emancipated and living in New Jersey. She hired Emil S. Cuccio, a lawyer . . . . She testified that the Wirtz family had been putting her off, *treating her as a child* who was not entitled to explanation. She hired Cuccio to get explanations and results. *No child*, Cuccio was given access to every document he requested during the

[14] Further, the Seventh Circuit analyzed petitioner's conduct in 1967 based upon the fact that she was 18 years old, not that that made her an "adult" under Illinois law. The court observed that "[a]lthough she was 18 in 1967 and the transactions were substantial—her interests in the residuary trust was more than $4 million--she did not ask for additional documents or seek professional advice. She signed, apparently without thinking, what William and Mary asked her to sign." (P. App. A-3) Though petitioner claimed virtual amnesia about the events of 1967, the court stated that "the documents handed to Susan in 1967, coupled with the identity of the trustee and the corporations in question, were enough to put a reasonable person on notice of the need for inquiry. Such an inquiry promptly would have turned up everything necessary to file a complaint." (P. App. A-11)

> next two years. Among the documents he did not request were the papers concerning the stock sold in 1967 and 1968.

(P. App. A-11 (emphasis added)) Quite apart from the question of when petitioner reached her majority, it is abundantly clear that the Seventh Circuit rested its decision on the independent basis of petitioner's lack of diligence when she was 26, with legal counsel at her side. The undisputed evidence was that all of the documents used by other lawyers to file suit in December 1980 were clearly available to attorney Cuccio: "[a]s of 1975, when Susan hired Cuccio to deal with the Wirtzes, the question was whether Cuccio knew (or could readily have learned) enough to call for inquiry. The answer to that is yes, even resolving all doubt in Susan's favor." (P. App. A-12)

Finally, had petitioner raised the issue of when a child reaches adulthood, and had the Seventh Circuit considered the point significant, the issue would not have been resolved as petitioner now suggests. It is clear that Illinois would have equalized the age of majority at 18, not 21. In *Munck v. Munck*, 62 Ill. App. 3d 223, 378 N.E.2d 1252 (1978), which concerned when a father's support obligations end, the court ruled that the age of majority after *Stanton v. Stanton*, 421 U.S. 7 (1975), was 18 for both males and females. Following this Court's decision in *Stanton II* (*Stanton v. Stanton*, 429 U.S. 501 (1977)), the court took note of the 1971 amendment to the Illinois majority statute, which equalized the age of majority at 18, and "read the amendment as an expression by the legislature that the public policy of Illinois is to treat both males and females as adults at the age of 18." 378 N.E.2d at 1255.

In *Munck*, the court distinguished its earlier decision in *Jeschke v. Ruhlow*, 59 Ill. App. 3d 125, 376 N.E.2d 15 (1978), the case upon which petitioner relies. It observed

that in *Jeschke*, it had not decided the question of equalizing ages, but rather determined only whether a specific statute barred a cause of action. *Munck*, 378 N.E.2d at 1255. That statute required a personal injury suit to be filed within two years from the time the plaintiff reached "the age of 21 years, or if a female, the . . . age of 18 years." In *Jeschke*, the court held that a lawsuit filed by a female within two years of the effective date of the legislature's equalization of the age of majority at 18 was timely. *Jeschke*, 376 N.E.2d at 17.

The peculiarities of such a statutory bar are not involved in this case. Rather, the issue is whether the statute of limitations, which had run, was tolled by equitable considerations. Nothing in *Jeschke* suggests that in the context of equitable tolling, an Illinois court would have, given the legislature's equalization of the age of majority at 18, either considered an 18 year old female to be a minor or disregarded the knowledge of her claim that a female acquired while age 18 or 19. In short, petitioner reads *Jeschke* too broadly. *Jeschke* does not, as petitioner claims, "equalize[ ] the age of majority at age 21 for statute of limitations purposes" (Pet. 25), and it does not control this case.

For these reasons, the premise of petitioner's argument—that the lawsuit of a male plaintiff in her position would have been found timely by the Seventh Circuit—is incorrect.

In sum, petitioner never argued that she was a child or claimed that she was entitled to special treatment because she was a child. The Seventh Circuit's judgment that petitioner failed to exercise due diligence clearly was determined independent of the question of her adulthood at the time of the transactions. Had petitioner bothered to raise the question, the answer would have been that

she was an adult in the eyes of Illinois law both before and after *Stanton.*

IV.

THE SEVENTH CIRCUIT USED THE CORRECT STANDARD IN REVIEWING THE JURY VERDICT

Appellate courts, no less than trial courts, are empowered to issue judgments notwithstanding the verdict. *See Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967). When urged to issue a judgment notwithstanding the verdict, a court must view the evidence in a light most favorable to the non-moving party and should grant the judgment when "(1) there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him." *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F.2d 163, 167-68 (7th Cir. 1980). The Seventh Circuit clearly stated that it was doing precisely that when, after "resolving all doubts in [petitioner's] favor," it reversed the verdict because there was insufficient evidence to support the jury's finding on reasonable diligence. (P. App. A-4, A-12) In doing so, the court expressly relied on *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir. 1985) and *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984), both of which use the standard quoted above. (P. App. A-12)

Petitioner now claims that the Seventh Circuit applied a different standard of review, relying solely on the court's statement that it conducted an "independent review of the record." (P. App. A-13) Petitioner takes out of context what obviously was nothing more than the court's assurance that it carefully examined the record before

issuing its decision. Indeed, the court's evident attention to the record is the hallmark of effective appellate review, rather than, as petitioner warns, a nefarious scheme to undermine jury verdicts that will "spread[ ] to other Circuits as well." (Pet. 29)

In point after point, the Seventh Circuit stressed that it was faithful to the judgment n.o.v. standard. At the outset, the court explained that the question was the sufficiency of the evidence before the jury. (P. App. A-4) It noted that the relevant facts were largely undisputed, and that the parties had agreed on one key fact—that petitioner's attorney was given all information he asked for. (*Id.* A-10, A-12) More importantly, the court resolved all doubt in petitioner's favor and still determined that she, and her attorney, failed to exercise reasonable diligence. (*Id.* A-12) The court explained that although it was not eager to set aside a jury verdict, it had no choice because the evidence was simply insufficient. (*Id.* A-13) There was nothing extraordinary about the court's review.

Finally, petitioner attempts to fashion a constitutional deprivation out of the Seventh Circuit's careful review. This Court previously has determined that judgments notwithstanding the verdict do not violate the Seventh Amendment, whether issued by a trial or an appellate court. *See Neely*, 386 U.S. at 322; *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 659-60 (1935). In light of the appellate court's strict adherence to the appropriate standard of review, the petitioner's rights were fully preserved. Her constitutional claim does not merit review in this Court.

CONCLUSION

For the reasons stated above, respondents request that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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Dated: October 15, 1987

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RESPONDENTS' APPENDIX 1

Plaintiff's Proposed Jury Instruction No. 36

The defendants contend as an affirmative defense that, even if the plaintiff establishes all the elements of her Rule 10b-5 claim, plaintiff's recovery is nonetheless barred because of the statute of limitations. The statute of limitations would bar the plaintiff's claims only if she failed to file her lawsuit within three years after the point in time at which she actually learned of the fraud or learned of facts which would put a reasonable person on notice of the alleged fraud. However, the statute of limitations is not available as a defense if you find either:

(a) that plaintiff did not actually discover the fraud which she alleges was perpetrated by the defendants prior to December 24, 1977, because the defendants took affirmative steps to conceal them; or

(b) that plaintiff did not actually discover the alleged fraud prior to December 24, 1977 even though she exercised reasonable care and diligence under the circumstances in seeking to learn facts which would have disclosed the alleged fraud.

I further instruct you that the presence of a fiduciary relationship between a plaintiff and a defendant bears heavily on the issue of whether the plaintiff exercised reasonable care and diligence in seeking to learn facts which would have disclosed an alleged fraud. A beneficiary of a trust has no affirmative duty to investigate the conduct of the trustee. Other factors which you may take into consideration in deciding whether the plaintiff exercised reasonable care and diligence include the plaintiff's opportunity to detect the fraud, and the plaintiff's sophistication and experience or lack of sophistication and experience.

RESPONDENTS' APPENDIX 2

District Court's Jury Instruction Concerning Statute Of Limitations And Tolling

The plaintiff filed her complaint on December 24, 1980. The law requires that Susan Norris file suit within three years from the date when she knew or should have known of the facts which give rise to her claims. Accordingly, as to each claim the plaintiff has the burden of proving by a preponderance of the evidence as to a particular defendant,

(a) that plaintiff did not actually discover the facts which gave rise to her claim prior to December 24, 1977, because the defendant took affirmative steps to conceal those facts; or

(b) that plaintiff exercised reasonable care and diligence in seeking to learn the facts which gave rise to her claim but did not discover them prior to December 24, 1977.

In determining whether the plaintiff exercised reasonable care and diligence in seeking to learn the facts which give rise to plaintiff's claims, you may consider the presence of a fiduciary relationship between the plaintiff and a defendant. A beneficiary of a fiduciary relationship is entitled to rely in the fiduciary's continued acknowledgement and performance of his fiduciary duties as evidence that no wrongdoing has occurred. Whether or not the plaintiff continued to rely on any fiduciary is a question of fact for you to decide. Moreover, a plaintiff is not entitled to so rely on a fiduciary relationship once she learns of facts which would put a reasonable person on notice of possible claim.